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Affirmed

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 150.

G. W. HARSHMAN, PLAINTIFF IN ERROR,

vs.

BATES COUNTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED FEBRUARY 16, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 150.

G. W. HARSHMAN, PLAINTIFF IN ERROR,

vs.

BATES COUNTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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1 In the circuit court of the United States for the western district of Missouri, November term, 1873.

Be it remembered that at a regular term of the circuit court of the United States for the western district of Missouri, begun and held at the city of Jefferson, Missouri, on the seventh day of November, A. D. 1873, among other proceedings had were the following, to wit:

G. W. HARSHMAN
vs.
BATES COUNTY.

Be it remembered that on the 25th day of said month, and during the said term of said court, the plaintiff, by his attorney, T. K. Skinker, files herein the following certificate of disagreement, in words as follows, to wit:

G. W. HARSHMAN
vs.
BATES COUNTY.

Be it remembered that the petition in this cause, filed March 22nd, 1873, in the circuit court of the United States for the western district of Missouri, is as follows:

Petition.

The plaintiff, G. W. Harshman, a citizen of the State of Ohio, complains of Bates County, in the State of Missouri, defendant herein,
2 and for cause of action plaintiff states that heretofore, to wit, on the 18th day of January, 1871, the said defendant, by its certain writing obligatory, called bond numbered 90, signed by B. H. Thornton, the then presiding justice of the county court of said county, attested by W. J. Smith, the then clerk, and sealed with the seal of said court, bearing date said day and year, acknowledged itself to be indebted and firmly bound to the Lexington, Lake and Gulf Railroad Company, and for and in behalf of Mt. Pleasant Township, in said county, promised to pay to said company or bearer the sum of one thousand dollars, at the Bank of America, in the city and State of New York, on the 18th day of January 1886, together with the interest thereon from the said 18th day of January, 1871, at the rate of ten per centum per annum, on presentation and delivery at said bank of certain coupons of interest thereto attached.

Plaintiff further states, that heretofore, to wit, on the day of , 187 , twenty-five persons, tax-payers and residents of said township of Mt. Pleasant, did petition said court, setting forth their desire as a township to subscribe the sum of ninety thousand dollars to the capital stock of the Lexington, Chillicothe and Gulf Railroad Company, and to issue bonds in payment thereof; and thereupon the said court did, on the 5th day of April, 1870, order an election to be held in said township,
3 on the 3d day of May, 1870, to determine if such subscription should be made to said company; that said company was at the several dates a corporation, duly incorporated under the laws of the State of Missouri, and was building and proposing to build its road into, through, and near said township; that said election was held as ordered, and two-thirds of the qualified voters of said township voting thereat voted in favor of said subscription.

Plaintiff further states, that afterwards, to wit, on the 4th day of October, 1870, the said company was consolidated with a certain other company, duly incorporated under the laws of the State of Missouri, and known as the Pleasant Hill Division of the Lexington, Chillicothe and Gulf Railroad Company, under the name of the Lexington, Lake and Gulf Railroad Company; that the terms and conditions of said consolidation had first been ratified and approved by a majority in interest of all the stock held in each of said companies, at a meeting of the stockholders of said two several companies regularly called for that purpose, and had been approved in writing by the persons holding and representing a majority of the stock in each of said several companies; and the provisions of the act of the general assembly of the State of Missouri, entitled "An act to amend chapter 63 of the general statutes of railroad companies, so as to authorized the construction, leas-
4 ing, and extension of railroads," approved March 24th, 1870, had been first accepted by each of said companies, by filing with the secretary of state of the State of Missouri a resolution accepting the provisions thereof, as required by law.

Plaintiff further states, that afterwards, to wit, on the 18th day of January, 1871, said court did, in pursuance of the authority conferred upon it by the vote of the people of said township, as above set forth, and under the terms and conditions of consolidation, subscribe the sum of ninety thousand dollars on behalf of said township to said Lexington, Lake and Gulf Railroad Company; and that said bond was, among others, issued by said court in payment of said subscription.

Plaintiff further states, that said Lexington, Chillicothe and Gulf Railroad was, by the terms of its charter, to commence at the city of Lexington, in Lafayette County, Missouri; thence to run southwestwardly from said city to Holden, on the Pacific Railroad, in Johnston county; thence southwardly through said Johnson County and Cass County in the direction of Butler, in Bates County; and thence southwardly to such point in said last-mentioned county as might be found most advantageous to connect said railway with Fort Scott, in Kansas; and that said Lexington, Lake & Gulf Railroad Company was, by
5 the terms of consolidation agreed upon between said Lexington, Chillicothe & Gulf Railroad Company and the said Pleasant Hill Division of said Lexington, Chillicothe & Gulf Railroad Company, to commence at said city of Lexington, and to run thence southwardly along the original route of said Lexington, Chillicothe, & Gulf Railroad Company to the southern boundary-line of Lafayette County; thence southwestwardly through Jackson County to the city of Pleasant Hill, on the Pacific Railroad, in Cass County; thence southwardly through said Cass County to the southern line of said county, where it was to intersect the original route of said Lexington, Chillicothe & Gulf Railroad Company, and from such point of intersection to such point in said Bates County as should be required to enable said consolidated company to demand, receive, and avail itself of the subscription voted by Mt. Pleasant Township as aforesaid, and by the township of Grand River, in said county, or either of them; thence to such point in or through Bates County as might be found most advantageous to connect with railroads constructed or to be constructed in the State of Kansas, or to extend southward through such counties in Missouri as might be most advantageous to connect or consolidate with railroads leading to the States of Arkansas, or Texas, or the Gulf of Mexico.

6 Plaintiff states that the amount of capital stock of said Lex-

ington, Chillicothe & Gulf Railroad Company was fixed at its charter at two millions of dollars, and that the capital stock of said consolidated road was also fixed by said articles of consolidation at two millions of dollars, and that the duration of each of said corporations was fixed at one hundred years.

Plaintiff states that said town of Butler is in or about the centre of Mt. Pleasant Township, in Bates County, and that said consolidated road is now located, graded, and bridged from said city of Lexington along the route of said consolidated road, as above described, to said town of Butler, and for several miles southward of said town; that southward of said town, so far as built, it pursues the same general direction as the proposed line of said Lexington, Chillicothe & Gulf Railroad, as above described, and that northward thereof it pursues identically the same line in the counties of Bates & Lafayette, and that the greatest divergence between said two lines at any point is fifteen miles, and that the distance between the said town of Butler and said city of Lexington is eighty-three miles.

Plaintiff further states, that said county of Bates has caused to
7 be collected by taxation from said township of Mt. Pleasant, and the property subject to taxation for such purpose in said township, under the act of the legislature of Missouri of March 23d, 1868, a large sum of money, to wit, the sum of five thousand dollars, and that out of said sum said county, on the 18th day of January, 1872, caused to be paid forty-four interest-coupons then due upon said bonds.

Plaintiff further states, that among the coupons of interest attached to said bond numbered 90, as aforesaid, was a certain coupon which is herewith filed, bearing date the day and year first aforesaid, whereby defendant promised to pay to bearer, on the 18th day of January, 1872, at the bank aforesaid, the sum of one hundred dollars, being one year's interest then to be due on said bond, which said bond and coupon are in words and figures as is shown by Exhibit A, filed with this petition and made part of it; that before and at maturity of said coupon he was and now is the holder for value of the same, yet it was not nor has since been paid, but remains now due and wholly unpaid; wherefore plaintiff prays judgment for said sum of one hundred dollars, with interest thereon from maturity of said coupon, and for four per
8 cent. damages upon said coupon, and for costs.

T. K. SKINKER,
Attorney for Plaintiff.

EXHIBIT A.

Bond.

No. 90. UNITED STATES OF AMERICA. $1,000.

STATE OF MISSOURI,
County of Bates:

Issued pursuant to articles of consolidation in payment of stock due the Lexington, Lake & Gulf Railroad Company, consolidated October 4th, A. D. 1870.

Know all men by these presents, that the county of Bates, in the State of Missouri, acknowledges itself indebted and firmly bound to the Lexington, Lake and Gulf Railroad Company in the sum of one thousand dollars, which sum the said county of Bates, for and in be-

half of Mt. Pleasant Township, therein promises to pay to the said Lexington, Lake and Gulf Railroad Company or bearer, at the Bank of America, in the city and State of New York, on the 18th day of January, A. D. 1886, together with the interest thereon from the
9 18th day of January, 1871, at the rate of ten per centum per annum, which interest shall be paid annually on the presentation and delivery at the said Bank of America of the coupons of interest hereto attached.

This bond being issued under and pursuant to an order of the county court of Bates County, by virtue of an act of the general assembly of the State of Missouri, approved March 23rd, 1868, entitled "An act to facilitate the construction of railroads in the State of Missouri," and authorized by a vote of the people taken May 3d, 1870, as required by law, upon the proposition to subscribe ninety thousand dollars to the capital stock of the Lexington, Chillicothe and Gulf Railroad Company, and which said railroad company last aforesaid and the former Pleasant Hill Division of the Lexington, Chillicothe and Gulf Railroad Company were, on the 4th day of October, 1870, consolidated, as required by law, into one company, under the name of the Lexington, Lake and Gulf Railroad Company, and which said last-named railroad company, as provided by law, and under the terms of said consolidation thereof, possesses all the powers, rights, and privileges, and owns and controls all the assets, subscriptions, bonds, moneys, and properties whatever
10 of the two said several companies forming said consolidation, or either one of them.

In testimony whereof the said county of Bates has executed this bond by the presiding justice of the county court of said county, under the order thereof, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing the seal of said court.

This done at the city of Butler, county of Bates, this eighteenth day of January, A. D. 1871.

{ COUNTY COURT SEAL, BATES CO., MO. }

B. H. THORNTON,
Presiding Justice of the County Court of Bates County, Mo.

Attest:
W. J. SMITH,
Clerk of the County Court of Bates County, Mo.

$100. *Coupon.* $100.

BUTLER, BATES COUNTY, MISSOURI,
January 18, 1871.

The county of Bates acknowledges to owe the sum of one hundred dollars, payable to bearer on the 18th day of January, 1872, at the
11 Bank of America, in the city of New York, for one year's interest on bond No. .

W. J. SMITH,
Clerk County Court Bates County, Mo.

Stipulation.

There are thirty other counts in the petition, each of which is founded upon a coupon detached from a bond of the county of Bates in behalf of said township, each of which bonds and coupons is the same in all

respects, except the number, as the bond and coupon set out in Exhibit A above, and each of the counts is like the first count in all particulars; and by consent of parties they are all omitted from this certificate.

The amount in controversy is thirty-one hundred dollars.

To the petition the defendant demurred; which demurrer is as follows, to wit:

Demurrer.

And now comes the said defendant and demurs to the petition filed in this cause, in that the said petition does not state facts sufficient to constitute a cause of action, and for grounds of such demurrer state'—

First. That it appears from the averments of said petition that the county court of Bates County had no right and no authority
12 in law to make a subscription to the capital stock of the Lexington, Lake & Gulf Railroad Company.

Second. That it appears from said petition that the question of making such subscription to the said Lexington, Lake & Gulf Railroad Company was never submitted to a vote of the people of Mt. Pleasant Township.

Third. That it appears from said petition that the bonds, the coupons upon which are the causes of action in this suit set forth, were not issued in conformity to any law, but were unauthorized and illegal.

Fourth. That the action of the county court of Bates County in making subscription such as is set forth in said petition, or issuing the bonds therein named or the coupons sued on, is shown by the petition to have been without warrant of law, and such subscription, bonds, and coupons were utterly void.

BASSETT, GLOVER & SHEPLEY,
For Defendant.

13 The said demurrer was submitted to the court, Dillon, circuit judge, and Krekel, district judge, being present and holding the term, and upon the questions raised by the said demurrer the said judges were opposed in opinion, as hereinafter stated; but the circuit judge being of the opinion that the demurrer was well taken, judgment was entered sustaining the same; and the plaintiff having elected to stand on his said petition, and refusing to amend the same, final judgment was entered on the demurrer against him for costs in accordance with the opinion of the presiding judge, which said final judgment is as follows:

Judgment.

G. W. HARSHMAN }
vs. }
BATES COUNTY. }

And now come the parties, by their attorneys, the plaintiff by T. K. Skinker, and the defendant by Bassett, Lay & Belch, and thereupon the demurrer of the defendant to the petition of plaintiff heretofore submitted to the court, which being seen and heard, it is by the court ordered that the said demurrer be sustained; and the plaintiff declining to amend the said petition, but declaring he will abide by the same, it is by the court
14 ordered and adjudged that the plaintiff take nothing by his writ,

and that said defendant go hence without day, and recover of the said plaintiff his costs and charges herein expended, and have thereof execution.

And now, to wit, November 25th, 1873, and during the same term of court, the said judges certify that upon the said demurrer and in the said cause they differed and still differ in opinion upon the following questions:

1st. Whether the petition set forth a legal cause of action against the defendant.

2d. Whether the demurrer to the petition ought to be sustained.

3d. Whether the county court had authority under the constitution and laws of Missouri to subscribe to the stock of the consolidated company under the vote of May 3d, 1870, in favor of one of the companies, which, after the vote, but before the subscription, consolidated with another company, forming thereby the company to which the subscription was made and the bonds issued.

4th. Whether the recitals in the bonds affected the plaintiff with notice of facts which defeat his right to recover thereon.

5th. Whether under the provisions of the said act of March 23d, 1868, recited in the bonds, and the constitution of the State, (art. 11, sec. 14,) the levy and collections of the taxes averred in the petition ratified the subscription and bonds or estopped the county to defend against the bonds and coupons.

Given under our hands this 25th day of November 1873.

JOHN F. DILLON.
A. KREKEL.

Filed Nov. 25th, 1873.

M. M. PRICE, *Clerk.*

And the said opinion of said court sustaining said demurrer is as follows, to wit:

Opinion.

G. W. HARSHMAN
vs.
BATES COUNTY.

This is an action against the county of Bates upon a large number of coupons, origi nally attached to bonds issued by the county court of the above-named county.

The following is a copy of one of the bonds and coupons as set out in the petition:

[No. 90. UNITED STATES OF AMERICA. [$1,000

STATE OF MISSOURI,
County of Bates:

Issued pursuant to articles of consolidation in payment of stock due the Lexington, Lake and Gulf Railroad Company, consolidated October 4th, A. D. 1870.

Know all men by these presents, that the county of Bates, in the State of Missouri, acknowledges itself indebted and firmly bound to the Lexington, Lake and Gulf Railroad Company in the sum of one thousand

dollars, which sum the said county of Bates, for and in behalf of Mt. Pleasant Township, therein promises to pay to the said Lexington, Lake and Gulf Railroad Company or bearer, at the Bank of America, in the city and State of New York, on the 18th day of January, A. D. 1886, together with the interest thereon from the 18th day of January, 1871, at the rate of ten per centum per annum, which interest shall be payable annually on the presentation and delivery at said Bank of America of the coupons of interest hereto attached.

This bond being issued under and pursuant to an order of the county court of Bates County, by virtue of an act of the general assembly
17 of the State of Missouri, approved March 23d, 1868, entitled "An act to facilitate the construction of railroads in the State of Missouri," and authorized by a vote of the people taken May 3d, 1870, as required by law, upon the proposition to subscribe ninety thousand dollars to the capital stock of the Lexington, Chillicothe and Gulf Railroad Company, and which said railroad company last aforesaid and the former Pleasant Hill Division of the Lexington, Chillicothe and Gulf Railroad Company were, on the 4th day of October, 1870, consolidated, as required by law, into one company, under the name of the Lexington, Lake and Gulf Railroad Company, and which said last-named railroad company as provided by law, and under the terms of said consolidation thereof, possesses all the powers, rights, and privileges, and owns and controls all the assets, subscriptions, bonds, moneys, and properties whatever of the two said several companies forming said consolidation, or either one of them.

In testimony whereof the said county of Bates has executed this bond by the presiding justice of the county court of said county, under the order thereof, signing his name hereto, and the clerk of said
18 court, under the order thereof, attesting the same and affixing the seal of said court.

This done at the city of Butler, county of Bates, this eighteenth day of January, A. D. 1871.

{ COUNTY COURT OF SEAL. BATES CO., MO. }

B. H. THORNTON,
Presiding Justice of the County Court of Bates County, Mo.

Attest:
W. J. SMITH,
Clerk of the County Court of Bates County, Mo.

$100.] *Coupon.* [$100.

BUTLER, BATES COUNTY, MO.,
Jan'y 18th, A. D. 1871.

The County of Bates acknowledges to owe the sum of one hundred dollars, payable to bearer on the 18th day of January, 1872, at the Bank of America, in the city of New York, for one year's interest on bond No. .

W. J. SMITH,
Clerk County Court Bates County, Mo.

The plaintiff in his petition alleged that on the 18th day of January, 1871, the defendant issued its several bonds, set out in the several
19 counts of the petition, to recover the amount evidenced by coupons, on which the suit was brought, by which it bound itself to pay to the Lexington, Lake and Gulf Railroad Company, and for and

on behalf of Mount Pleasant Township, in said county, one thousand dollars, which it promised to pay to said company at the Bank of America, &c.

It alleged that prior to the 5th day of April, 1870, certain tax-payers of Mount Pleasant Township petitioned the county court of Bates County, setting forth their desire to subscribe $90,000 to the stock of the Lexington, Chillicothe & Gulf Railroad Company, and thereupon the court ordered an election in said township for the 3d of May, 1870, which was held, and two-thirds of the qualified voters of said township voted thereat voted for it.

It further alleged that on the 18th day of July, 1870, another corporation was formed by the name of the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company, and that these two corporations, one being the Lexington, Chillicothe & Gulf R. R. Co., and the other being the Pleasant Hill Division of the Lexington, Chillicothe & Gulf R. R. Co., were, on the 4th day of October, 1870, consolidated under the name of the Lexington, Lake & Gulf R. R. Co.

That thereafter, to wit, on the 18th of January, 1871, the county
20 court of Bates County, in pursuance of the authority conferred upon it by the vote of the people of said township, subscribed the said sum of $90,000 in behalf of said township to said Lexington, Lake and Gulf Railroad Company, (the consolidated company;) and that said bonds (to which the coupons in suit were annexed) were, among others, issued by the said court in payment for said subscription.

The plaintiff alleges that he became a holder of the coupons in suit before maturity, and for value, and asks judgment for the value thereof.

The defendant demurs to the petition, on the ground that it shows that the county court had no authority in law to make the subscription recited in the bonds or to issue the bonds in payment therefor, and because it also shows that the question of making the subscription to the new or consolidated company was never submitted to a vote of the people of Mt. Pleasant Township, nor assented to by them, as required by the constitution and laws of the State.

T. K. Skinker for the plaintiff.
Glover, Shepley & Bassett for the county.

21 DILLON, *Circuit Judge:*

The following facts are recited in the bonds (the coupons on which are in the suit) and alleged in the petition:

1st. That the bonds were issued, pursuant to articles of consolidation, in payment of stock due the Lexington, Lake and Gulf Railroad Company, consolidated October 4, 1870.

2d. That they were issued by the county "for and in behalf Mount Pleasant Township," under the act of March 23d, 1868, known as the township railroad aid law. (Laws of 1868, p. 92; 1 Wagner Stat., p. 313.)

3. That the proposition submitted on the 3d day of May, 1870, to the voters of the township, and by the requisite majority then assented to, was whether they would authorize the county court "to subscribe $90,000 to the capital stock of the Lexington, Chillicothe and Gulf Railroad Company."

4. That afterwards, July 18, 1870, another corporation was newly formed under the laws of the State, namely, the Pleasant Hill Division of the Lexington, Chillicothe and Gulf Railroad Company; and
22 that afterwards, October 4, 1870, under the act of March 24, 1870,

these two companies (as recited in the bond) were "consolidated, as required by law, under the name of the Lexington, Lake and Gulf Railroad," (the payee in the bond,) "which last-named company," the bond continues, "as provided by law, and under the terms of said consolidation thereof, possesses all the powers, rights, and privileges, and owns and controls all the assets, subscriptions, bonds, moneys, and properties whatever of the two said several companies forming said consolidation, or either of them."

5. That afterwards, January 18, 1871, the county court, claiming to be authorized thereto by the above-mentioned vote of May 3d, 1870, in Mt. Pleasant Township, and reciting this vote in the bonds as its source of power, made the subscription, not to the company to which it had been voted, but to a new company into which that company had, after the vote, but previous to the subscription, been merged or consolidated under the laws of the State.

Upon these facts, all of which appear on the face of the petition, and substantially all on the face of the bonds in suit, the question is
23 whether the bonds are valid and binding obligations in the hands of a bona-fide holder.

This case contains an element, not in the Cass County Township bond cases, decided at this term on demurrer, growing out of the fact that here the subscription was made, after the vote was taken, to a new or consolidated company. (Jordan v. Cass County, decided at this term.)

The case also differs, as I think, from other cases in this court, and from cases decided by the Supreme Court of the United States, in the circumstance that all of the facts relied on as showing the want of power to issue the bonds are recited in the bonds themselves; and clearly, as it seems to me, it must be true that the holder of these bonds is charg'able with actual notice of the facts therein stated concerning them; and if such facts show that, in point of law, the county court had no power to make the bonds, the holder is conclusively presumed to have knowledge of such want of authority.

If the facts stated in the bonds and averred in the petition show that there was no power to issue the bonds, and if the plaintiff is affected with notice of these facts and of their legal consequences, we have no
24 question here as to the rights of any innocent holder for value, for the case is the same as if the action were by the railroad company to which the subscription was made and the bonds delivered.

The case differs also from those in which the subscription was made by the county court, without a vote of the people, under authority to do so, contained in special charters granted prior to the adoption of the present constitution, as in Nicolay vs. St. Clair County, decided at this term.

The provisions of the constitution and the general laws of the State in pursuance of it apply to this subscription, so that as between the county or the people of the township on the one hand, and the railroad company or any holder of the bonds with actual notice on the other, an assent of two-thirds of the qualified voters of the township to the making of the subscription is an indispensable prerequisite to its lawfulness and to the validity of bonds issued in payment therefor.

The constitution of Missouri of 1865 contains the following: "The general assembly shall not authorize any county, city, or town to
25 become a stockholder in or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." (Art. 11, sec. 14.)

And this requirement of a two-thirds vote *of* a condition of the right of any county, city, or town to take stock in or loan credit to any railroad company is also made in the enactments of the legislature passed in pursuance of the above-mentioned provision of the constitution. (Wagner's Stat., p. 305, sects. 17, 18.)

And such a precedent vote is also required in the township railroad aid act of March 23, 1868, under which the vote was taken and the bonds now before the court were issued. (Jordan vs. Cass County, at this term.)

Accordingly the question was submitted to the voters of Mt. Pleasant Township on the 3d day of May, 1870, whether they would subscribe $90,000 to the Lexington, Chillicothe and Gulf Railroad Company, and the requisite two-thirds of those voting at the election voted therefor.

But before any subscription was made, or bonds issued, or steps
26 taken to carry out this vote, the company in whose favor the aid was voted consolidated with a distinct corporation not in existence when the election was held, and the two (as recited in the bond) were merged "into one company under the name of the Lexington, Lake and Gulf Railroad Company," to which, in the January following, the subscription, under the vote of the previous May, was made and the bonds in suit issued.

This consolidation under the act of March 24, 1870, which authorizes a majority in interest of all the stock of "any two or more railroad companies in this State, * * * * to consolidate in the whole or in the main, and form one company, owning and controlling such continuous line of road, with all the powers, rights, privileges, and immunities, and subject to all the liabilities and obligations to the State or otherwise which belonged to or rested upon either of the companies making such consolidation." (Wagner's Stat., p. 314, sec. 56.)

So that upon the face of the act it appears that, upon the consolidation being effected in pursuance of its provisions, the old com-
27 panies are merged in the new, which, however, succeeds to all the rights, powers, privileges, and immunities, and is subject to all the liabilities and obligations of both the companies making the consolidation.

And such would appear to be the effect of the consolidation were there no statute provisions upon the subject. (Clearwater vs. Meredith, 1 Wall., 40; McMahan v. Morrison, 16 Ind., 172; Tomlinson v. Branch, 15 Wall., 465.)

Under the legislation of the State, where two companies consolidate and form one, the stock is changed and the former companies become extinct, and the line of the road is changed as may be provided in the articles of consolidation.

In the case before the court the nature of the changes in the line of the road of the consolidated company is set forth in the petition.

And it seems to me to be perfectly clear, upon the well-settled principles of law, that a subscriber to the stock of company A, after it has consolidated with company B and formed company C, cannot be compelled by the latter company to pay the subscriptions, and the
28 plain reason is that such was not his contract. Such a change is structural and organic, and is not binding upon a non-assenting subscriber or stockholder, unless the right to make it was reserved at the time the corporation was created or the contract of subscription was made.

In support of these views the case of Clearwater v. Meredith, supra, decided by the Supreme Court of the United States, is a direct author-

ity, and if it cannot be reconciled with the majority opinion in the Pacific Railroad v. Hughes, 22 Mo., 291, it would not be difficult, perhaps, to show that the views of the Supreme Court of the United States, besides from their authoritative force in this court, are most consonant with principle and with adjudications elsewhere.

It follows that if the subscription which Mt. Pleasant Township authorized by its vote had actually been made, it could not have been enforced by the new company; if made by the county court to the new company, it would be without authority, and bond issued therefor would be both unauthorized and without consideration, and could not
29 therefore be enforced by the new company or by any holder with notice of the facts.

But the case in hand is one where no subscription was ever made to the company *to the company* to which it was voted, and it might be conceded that, if it had been actually made, the right to it would pass by operation of the statute to the new company, without the concession involving the conveyance of a liability upon a subscription made for the first time after the new corporation was formed.

The opposite view would nullify the constitutional provision by defeating the purpose it was designed to accomplish.

The theory of the constitution and the acts of the legislature passed in pursuance of it is that no stock in a railroad company shall be taken by the public corporations or municipalities of the State, unless two-thirds of the voters sanction it; and it is necessarily implied that the company whose stock is to be taken and paid for in bonds must be specified and known.

Is it possible that when the people vote that they will take stock in a particular company, which is named, that this will authorize the county court to make the subscription to another corporation?

30 The frauds which such a doctrine would produce, and the injustice which would result from it, may be seen and need not be portrayed.

By such a construction the constitutional provision, which was conceived in the highest wisdom, and was intended to remedy for the future a mischief then already begin'ing to be felt, would be deprived of effective operation and rendered of little or no value.

The principle, where the law requires a precedent vote, and the vote is in favor of the municipal or public corporation subscribing to the stock of a particular company, that a subscription to the *vote* of another and distinct corporation is unauthorized and not binding, was decided by the Supreme Court of the United States in the case of Marsh v. Fulton County, 10 Wall, 676, and that, too, in a case where the face of the bonds did not so fully as in the case at bar display the history of their issue and of the subscription in which they originated.

In my judgment, under the principles established by the cases of Clearwater v. Meredith and Marsh v. Fulton County, above men-
31 tioned, the county court of Bates County had no power to make the subscription recited in the bonds here in question, or to issue the bonds; and I consider this view to be consistent with the many cases in which that court has decided, in substance, that nothing but a want of power to issue such securities can avail against a holder for value without actual notice of the *notice of the* equities set up by way of defence.

I might dwell upon the fact that the statute in relation to the consolidation was, as in the case of Clearwater v. Meredith, permissive and not mandatory upon the companies, and point out the hardship of

holding the township or its people bound by a subscription to a consolidated company, when they had never authorized such a subscription, nor ever had an opportunity to vote against or oppose the consolidation, but it scarcely necessary to do so.

As the facts which in law show the bonds to have been issued without authority appear on their face, and are alleged in the petition, it is my judgment that the plaintiff cannot recover thereon, and ac-
32 cordingly the demurrer to the petition will be sustained.

Judgment accordingly.

Krekel, J., dissented.

33 UNITED STATES OF AMERICA,
Circuit Court of the United States for the western district of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the western district of Missouri, do hereby certify the writing hereto annexed to be copies of the certificate of disagreement of the judges of said court and of the opinion of the honorable John F. Dillon, circuit judge, in case of G. W. Harshman against Bates County, as fully as the same remain on file and of record in said case, in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of Jefferson, in said western district, this fourth day of December, in the year of our Lord eighteen hundred and seventy-three.

[SEAL.] M. M. PRICE,
Clerk of said Court.

34 (Indorsed:) No. 111. United States circuit court, western district of Missouri. G. W. Harshman against Bates County. Duly certified copy of the in the above-entitled cause.

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the November term, 1873, thereof, between G. W. Harshman, plaintiff, and Bates County, defendant, a manifest error hath happened, to the great damage of the said G. W. Harshman, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, this seventeenth day of November, in the year of our Lord one thousand eight hundred and seventy-three.

Issued at office in the city of Jefferson, with the seal of the circuit

court of the United States for the western district of Missouri, dated as aforesaid.

[SEAL.[M. M. PRICE,
Clerk C. C. U. S., Western District of Missouri.

Allowed by—

A. KREKEL, *Judge.*

UNITED STATES OF AMERICA,
Western district of Missouri, ss:

In obedience to the within writ, I herewith send to the Supreme Court of the United States a duly-certified transcript of the record & proceedings in the within-mentioned case, with all things concerning the same.

Witness my hand and official seal, at office in the city of Jefferson, in said district, this 29' day of January, A. D. 1874.

[SEAL.] M. M. PRICE,
Clerk of said Circuit Court.

(Indorsed:) United States circuit court, western district of Missouri. G. W. Harshman vs. Bates County. Writ of error to the circuit court of the United States for the western district of Missouri. Returned and filed 187 . , clerk.

36 The United States of America to Bates County, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Missouri, wherein G. W. Harshman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Arnold Krekel, judge of the circuit court of the United States for the western district of Missouri, this 26th day of December, in the year of our Lord one thousand eight hundred and seventy-three.

A. KREKEL,
Judge United States Circuit Court, Western District of Missouri.

Attest:
M. M. PRICE,
U. S. Ct. Clerk.

37 I hereby certify that I executed the within writ by delivering a copy of the same personally to William J. Smith, clerk of the county court of the within-named county of Bates, in the western district of Missouri, this the 10th day of January, A. D. 1874.

GEORGE SMITH,
Marshal Western District of Missouri,
By his deputy, WM. H. MCLAIN.

(Indorsed:) E. No. 111. United States circuit court, western district of Missouri. G. W. Harshman vs. Bates County. Citation filed Dec'r 26, 1873. M. M. Price, clerk.

Marshal's fees: Mil'age, 150 miles, $9.00; serving this writ 2.00—$11.00.

(Indorsement on cover:) No. 150. G. W. Harshman, plaintiff in error, vs. Bates County. W. Missouri C. C. U. S. Filed 16th February, 1874.

O

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1875.

G. W. HARSHMAN, *Plaintiff in Error*,
vs.
BATES COUNTY, *Defendant in Error*.

No. 150

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF AND ARGUMENT OF T. K. SKINKER,
For Plaintiff in Error.

Powell & Maynard, Printers, St. Louis.

IN THE SUPREME COURT OF THE UNITED STATES.

G. W. HARSHMAN, PLAINTIFF IN ERROR.
vs.
BATES COUNTY, DEFENDANT IN ERROR.

STATEMENT.

This case comes here upon a certificate of division in opinion between the judges who held the Circuit Court, upon a demurrer to petition.

The petition alleges that on the 18th day of January 1871, the defendant issued its several bonds, set out in the several counts of the petition, to recover the amount evidenced by coupons on which the suit was brought, by which it bound itself to pay to the Lexington Lake and Gulf Railroad Company, and for and on behalf of Mount Pleasant Township in said county one thousand dollars, which it promised pay to said company at the Bank of America, &c.;

That prior to the 5th day of April, 1870, certain tax-payers of Mount Pleasant Township petitioned the county court of Bates County, setting forth their desire to subscribe $90,000 to the stock of the Lexington *Chillicothe* & Gulf Railroad Company, and thereupon the court ordered an election in said township for the 3d of May 1870, which was held, and

two-thirds of the qualified voters of said township voting thereat voted for it;

That on the 18th day of July 1870 another corporation was formed by the name of the Pleasant Hill Division of the Lexington Chillicothe & Gulf Railroad Company, and that these two corporations, one being the Lexington Chillicothe & Gulf R. R. Co., and the other being the Pleasant Hill Division of the Lexington, Chillicothe & Gulf R. R. Co., were, on the 4th day of October 1870 consolidated under the name of the Lexington *Lake* & Gulf R. R. Co.;

That thereafter, to wit, on the 18th of January 1871, the county court of Bates County, in pursuance of the authority conferred upon it by the vote of the people of said township, subscribed the said sum of $90,000 in behalf of said township to said Lexington *Lake* & Gulf Railroad Company (the consolidated company); and that said bonds (to which the coupons in suit were annexed) were, among others, issued by the said court in payment for said subscription;

That plaintiff became a holder of the coupons in suit before maturity, and for value, and asks judgment for the value thereof.

The petition further describes minutely the intended route of the Lexington Chillicothe & Gulf Company, and also the route adopted by the Lexington Lake & Gulf Co. It states that the consolidated road is now located, graded and bridged from Lexington, the northern terminus, to and beyond Butler, a town situated about the centre of Mt. Pleasant Township; that southward of that point, as far as built, it pursues the same general course as the line pro-

posed for the Lexington Chillicothe & Gulf Co., and northward thereof it pursues, in the main, identically the same line. It alleges also the collection of taxes in the township, and the payment of one year's interest.

The following portions of the bond are material to be noted:

"Issued pursuant to articles of consolidation in payment of stock due the Lexington Lake & Gulf Railroad Company, consolidated October 4th, A. D. 1870.

Know all men by these presents, that the county of Bates in the State of Missouri, acknowledges itself indebted and firmly bound to the Lexington, Lake and Gulf Railroad Company in the sum of one thousand dollars, which sum the said County of Bates, for and in behalf of Mt. Pleasant Township, therein promises to pay to the said Lexington Lake & Gulf Railroad Company, etc., etc.

This bond being issued under and pursuant to an order of the County Court of Bates County, by virtue of an act of the General Assembly of the State of Missouri, approved March 23rd, 1868, entitled "An act to facilitate the construction of railroads in the State of Missouri," and authorized by a vote of the people taken May 3d, 1870, as required by law, upon the proposition to subscribe ninety thousand dollars to the capital stock of the Lexington Chillicothe and Gulf Railroad Company, and which said railroad company last aforesaid and the former Pleasant Hill Division of the Lexington Chillicothe & Gulf Railroad Company were, on the 4th day of October 1870, consolidated, as required by law, into one company, under the

name of the Lexington Lake and Gulf Railroad Company, and which said last-named railroad company, as provided by law, and under the terms of said consolidation thereof, possesses all the powers, rights, and privileges, and owns and controls all the assets, subscriptions, bonds, moneys and properties whatever of the two said several companies forming said consolidation, or either of them. In testimony whereof, etc., etc.

The demurrer proceeds upon the ground that the petition shows that the county court had no authority in law to make the subscription recited in the bonds or to issue the bonds in payment therefor, and also shows that the question of making the subscription to the new or consolidated company was never submitted to a vote of the people of Mt. Pleasant Township, nor assented to by them, as required by the constitution and laws of the state. (Record p. 5.)

The questions presented by the certificate of division are he following:

1st. Whether the petition set forth a legal cause of action against the defendant.

2d. Whether the demurrer to the petition ought to be sustained.

3d. Whether the county court had authority under the constitution and laws of Missouri to subscribe to the stock of the consolidated company under the vote of May 3d, 1870, in favor of one of the companies, which, after the vote, but before the subscription, consolidated with another company, forming thereby the company to which the subscription was made and the bonds issued.

4th. Whether the recitals in the bonds affected the plain-

tiff with notice of facts which defeat his right to recover thereon.

5th. Whether under the provisions of the said act of March 23d, 1868, recited in the bonds, and the constitution of the State (art. 11. sec. 14.), the levy and collections of the taxes averred in the petition ratified the subscription and bonds or estopped the county to defend against the bonds and coupons. (Record p. 6.)

At the time this subscription was voted and made, and when the bonds were issued, the following constitutional provision and laws were in force in Missouri:

1. CONSTITUTION MO. ART. 11, SEC. 14.

"The general assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation, unless *two-thirds of the qualified voters of such county*, city, or town, at a regular or special election to be held therein shall assent thereto." Wagner's Statutes, Ed. 1872, p. 62.

2. THE TOWNSHIP AID ACT.

"Whenever twenty-five persons, tax-payers and residents in any municipal township for election purposes in any county in this State, shall petition the county court of such county, setting forth their desire as a township to subscribe to the capital stock of any railroad company in this state, building or proposing to build a railroad into, through or near such township, and stating the amount of such subscription, and the terms and conditions on which they desire it made, it shall be the duty of the county court, as soon as may be thereafter, to order an election to be held in such township to determine if such subscription shall be made; which election shall be conducted, etc., etc.; and if it shall appear from

the returns of such election that not less than two-thirds of the qualified voters of such township, *voting at such election*, are in favor of such subscription, *it shall be the duty of the county court to make such subscription* in behalf of such township, according to the terms and conditions thereof, and if such conditions provide for the issue of bonds in payment of such subscription, the county court shall issue such bonds in the name of the county, with coupons, etc. (Wagner's Stat. p. 313, sec. 51; Laws of Mo. 1868, p, 92.

3. THE RAILROAD CONSOLIDATION ACT:

"Any two or more railroad companies in this state existing under either general or special laws, and owning railroads constructed wholly or in part, which when completed and connected will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the state or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders regularly called for the purpose, or by the approval in writing of the persons or parties holding and representing a majority of such stock," etc., etc., etc. (Wagner's Stat. 314, § 56; Laws of Mo., 1870, p. 98.)

Under the Township Aid Act the county court was authorized to issue bonds on behalf of any township in its county to pay for stock subscribed to a railroad company, provided the subscription was first sanctioned by a vote of the people of the township. The bonds were issued in the name of the county, purporting on their face to be the promise of the county. They were issued in this form be-

cause at that time townships in Missouri had not been endowed with corporate capacity, and had no separate governing body to administer their affairs. They, however, constituted no obligation of the county; the holder's only claim is against the township, which alone is liable to be taxed to pay them. This was the effect assigned them, very soon after the passage of the act, in State v. Linn County Court, 44 Mo. 504. Accordingly it has been the practice in suits upon such bonds to enter judgment against the county, with a clause limiting its enforcement to the township. There are now many such of record in the federal courts in Missiouri. This much I have deemed it necessary to say of the form of these bonds only because they are peculiar; no question was raised or considered in the court below relating to their form or their effect as county obligations. The only questions considered were:

1. Whether the county court was authorized to make the subscription to the Lexington *Lake* & Gulf Co.

2. Whether the collection of taxes in the township, and the payment of interest for one year ratified the subscription and bonds, if improperly made and issued, and estopped the county to defend against them. Upon these points plaintiff in error insists that the court erred, and begs to submit the following

BRIEF AND ARGUMENT:

I. The vote of May 3d, 1870, invested the Lexington Chillicothe & Gulf Railroad Company with either the right

to demand a subscription of stock or at least the privilege of receiving one; and this—right or privilege—passed by virtue of the consolidation, to the Lexington Lake & Gulf Company, so as to authorize the county court to make the subscription to the latter company, and issue the bonds in suit.

The petition shows that such steps had been taken pursuant to law; that the county court might at any time after May 3d, 1870, have made a subscription to the Lexington Chillicothe & Gulf Railroad Company. The ground of defendant's complaint is, that this subscription was not made, but one was made to the Lexington Lake & Gulf Company, which, it is insisted, was an entirely different corporation, and the bonds sued on were issued to pay that subscription; and so it is sought to bring this case within the principle decided in Marsh v. Fulton Co., 10 Wall. 676. The cases are different. There the county court was authorized by a vote of the people to subscribe to the Mississippi & Wabash Railroad Company; afterwards, in pursuance of legislative action taken subsequent to the vote, this company was divided into three corporations, and the subscription was made to one of them. Here the legislative action took place prior to the vote. The railroad consolidation law was in force when that was taken; the township was acting in view of that law; its provisions must be deemed to have entered into the calculations of the voters; it permitted consolidation upon a majority vote of the stockholders. The township must be deemed to have assented in advance to any lawful consolidation that might receive that sanction. Such was the ruling of this court in Nugent v. Supervisors of

Putnam Co., 19 Wall. 241. It has been recently said in the Supreme Court of Missouri: "I do not believe that a power given to a county to subscribe to the stock of a specific railroad enterprize will authorize the county to subscribe to the stock of a wholly different company with a different enterprise in view, with which the former company may have become consolidated or to which it may have transferred its corporate rights, *unless the consolidation or transfer was contemplated by the original charter of the company or provided for by the general law.*"

State v. Greene Co., 54 Mo., opinion of Vories, J., at p. 562.

The difference between the present case and the Putnam County case is, that in the latter there was a subscription of stock actually made and accepted prior to the consolidation. Here the record does not show that any was made till after consolidation had taken place. What weight is to be given to this fact? The scope of the consolidation law is to substitute the consolidated company for both the constituent companies. It makes the former the full representative in law of both the latter, giving it all the powers, rights, and privileges that belonged to either of them. Whatever either of them could have done, it can do. Whatever contracts could lawfully have been made by or with either of them, can lawfully be made by or with it. Whatever subscriptions it was lawful to make to either of them, it becomes lawful to make to it. Undoubtedly this is the general rule. In its application to the present case it becomes necessary to inquire in what relation the Lexington, Chillicothe &

Gulf company stood towards the county court after the vote of May 3d, 1870. Did that vote make it the imperative duty of that body, or did it merely empower it to subscribe? The language of the act is "If it shall appear from the returns of such election, that not less than two-thirds of the qualified voters of such township, voting at such election, are in favor of such subscription, *it shall be the duty of the county court to make such subscription* in behalf of such township," etc.

It matters little which view we take. If the vote be deemed merely to confer a power without creating an obligation to subscribe, this constitutes a privilege of the corporation, which can be transferred by consolidation to another company.

Smith v. Clark Co., 54 Mo. at pp. 66, 67.
State v. Greene Co., Ib. at p. 551.

These cases are authority for the position, that whenever the county court stands empowered to make a subscription, there arises a corresponding privilege on the part of the company to receive it, and that privilege, like other franchises, pass by consolidation. In both of them the county court was authorized by charter to subscribe (without a popular vote) to a company, which had since undergone consolidation, and a subscription had been made to the consolidated company. It was insisted for the defence that the permission given to the court to subscribe was a mere power vested in that body, and not liable to be transferred by consolidation. But the supreme court held it to be clearly a privilege of the company—and one of the first importance,

too — and that it did pass. It can make no difference whether this power is conferred by legislative action alone, or by legislative action coupled with or supplemented by a popular vote. These are but different modes of conferring the power. When conferred it must be the same and be followed by the same consequences in either case.

But there is no room to doubt that the vote imposed an obligation upon the county court which it could not escape. The law says that in case of a favorable vote "*it shall be the duty of the county court to make the subscription.*" This leaves in that body no discretion. It is not for them to decide whether the subscription shall be made. That question is finally determined by the qualified voters of the township. Under the law, the sole duty and the absolute duty of the county court, is to carry out their wishes as expressed at the polls. The language is as imperative as the legislature could make it—very different from that employed in the 17th section of the same act: "*It shall be lawful* for the county court of any county * * * * * to take stock for such county * * in or loan the credit thereof to any railroad company * * * * * provided that two-thirds of the qualified voters of such county * * * at a regular or special election to be held therein, shall assent to such subscription." (Wag. Stat., 305.) Under a statute similar to this, it has been held that, notwithstanding a subscription may have obtained the assent of the requisite majority of the electors of the county, it was still within the discretion of the court to refuse to make it.

R. R. Co. v. Buchanan Co. Ct., 39 Mo. 485.

The correctness of this decision has not passed altogether unchallenged; but the reasons therein assigned place it beyond doubt, that under the township aid act, the vote of the people imposed upon the county court an absolute duty to subscribe; which duty the railroad company was authorized by law to enforce by mandamus. (Wag. Stat., 306, § 22.) This constitutes a clear right of action, absolute and complete from the date of the vote. From that time the subscription of the township, though not formally ordered by the court or transcribed upon the books of the company, is to be deemed the property of the company, transferrable according to law, like any other asset.

Thus, whichever view we take, whether we consider that by the vote the Lexington Chillicothe & Gulf Company acquired a mere privilege, dependent for its value upon the future action of the county court, or an absolute right enforceable against that body, by virtue of the consolidation, which under the law gives to the new company all the rights and privileges of both the old companies, it became the property of the Lexington Lake & Gulf Company. If it was no more than a privilege, the act of the latter company in receiving the subscription was lawful, and that of the county court in making it could not have been otherwise. If it was an enforceable right the county court was justified in subscribing the stock and issuing the bonds without waiting to be compelled by mandamus.

It is argued that by this means the township is made to contribute to a different enterprise from the one intended.

The same objection was urged in Nugent v. The Supervisors and was quite as applicable there as here; for the people voted a subscription to one company; it was made and immediately turned over to another (consolidated) company. It is clear that practically it must be immaterial whether the subscription is first made to the original company, and then transferred to the consolidated, or whether it is made directly to the latter. In either case the county does not get stock in the very company designated by the vote, and if this consideration be held paramount, in both alike the subscription should be held void; and this was the opinion of the learned Circuit Judge, who said: (R. p. 11.) "It follows that if the subscription which Mt. Pleasant towhship authorized by its vote had actually been made, it could not have been enforced by the new company; if made by the county court to the new company, it would be without authority, and bonds issued therefor would be both unauthorized and without consideration, and could not therefore be enforced by the new company, or by any holder with notice of the facts. But the case in hand is one where no subscription was ever made to the company to which it was voted, and it might be conceded that, if it had been actually made, the right to it would pass by operation of the statute to the new company, without the concession involving the conveyance of a liability upon a subscription made for the first time after the new corporation was formed. * * * * * *
In my judgment, under the principles established by the cases of Clearwater v. Meredith, and Marsh v. Fulton County, above mentioned, the county court of Bates County had no power to make the subscription recited in the bonds here in question, or to issue the bonds."

This opinion was delivered before the case of Nugent v. The Supervisor was decided. As that case expressly repudiated the views advanced upon the state of facts first supposed by the learned circuit judge, we believe that principle requires the reversal of the entire judgment.

The opinion further urges "the frauds which such a doctrine would produce, and the injustice which would result" from the adoption of the plaintiff's views. It is clear there is no greater opportunity for the perpetration of fraud in a case like the present than in Nugent v. The Supervisors; nor is it easy to see the injustice of permitting the county court to do at one step what that case decides might have been done at two. That body being entitled to all the privileges of other stockholders (Wag. Stat., 306, § 21), may vote the stock at all elections and upon every question; and is accustomed to exercise this power either through one of its members or through a commissioner specially appointed for the purpose. In the exercise of this power it may be the active means of effecting consolidation. Controlling a large number of shares it may even force it in spite of a large minority of stockholders and in defiance of the protests of the citizens. It is the sole judge of the propriety and expediency of its own conduct. In view of the ample powers thus entrusted by law to the keeping of this body, it would seem to be taking narrow ground, if we draw a decisive distinction between the case, where a subscription is made, and after consolidation (effected perhaps by the vote of the county court) transferred to the new company, and one where no action is taken till after consolidation, when the court by

one and the same act signifies its assent to the proceeding and subscribes the stock. The course pursued in the present case is at most irregular. Since Nugent v. The Supervisors it can not be denied that the County Court of Bates County might have subscribed the stock to the Lexington Chillicothe & Gulf Co. and then transferred it to the Lexington Lake & Gulf. Failing, however, to act promptly, and the consolidation having in the meantime taken place, the court proceeded to make the subscription directly to the latter company. Granting this to be an irregular proceeding, the irregularity is surely not so great as to be incurable. The collection of taxes in the township and the payment of one year's interest on the bonds, averred in the petition, should be held sufficient to obviate so slight an objection.

Supervisors v. Schenck, 5 Wall. 772.

II. *The railroad company was substantially the same after consolidation as before; and upon this ground the county court had the right to make the subscription and in payment issue the bonds in suit.*

It appears from the petition that the new company is substantially the same as the old. In Hughes v. Pacific R. R., 22 Mo. 291, and Renshaw v. Pacific R. R., 18 Mo. 210, it was held that stockholders were bound for their subscriptions, although since they were made, great changes had taken place in the corporation in respect to route, amount of capital stock, power to mortgage, etc. The former of these cases was supposed by the learned Circuit Judge to be at variance with the rulings of this court; but its fellow appears

to have met the approval of this court in Nugent v. The Supervisors. These decisions go upon the ground that so long as it was substantially the same enterprise, the stockholders could not object, for a law in existence at the time their subscriptions were made authorized the changes. Upon the same principle we think that as the Lexington Lake & Gulf Company was in point of fact substantially the same company as the Lexington Chillicothe & Gulf, the county court might lawfully make the subscription upon that ground independent of any other.

Society for Savings v. New London, 29 Conn. 174.

II. The subject of township subscriptions is within the exclusive control of the legislature, and is not affected by art. 11, *sec.* 14 *of the constitution of Missouri of* 1865. *This case is, therefore, to be determined without reference to that section.*

This subscription has thus far been treated as if it stood upon the same footing as though made by an individual. On the part of the defendant it is, however, insisted that the 14th section of the 11th article of the constitution (*supra*), gives rise to a broad distinction. It is claimed that that section has the effect to forbid the subscribing to one company of stock voted to another; and that the consolidation law, so far as it may be appealed to, to sustain such a transfer, is in conflict with it, and is void. Our answer is that this section of the constitution does not apply to townships, nor regulate township subscriptions. It names counties, cities and towns, but not townships. The preceding section (the 13th) prohibits *state* aid to corporations. It might as well be said that this applies to townships and

forbids any subscription by them. The argument is, that as the township is a part of the county, and the county is subject to the provisions of the 14th section, therefore the township must be, otherwise the legislature might evade that section by permitting all the townships in a county to make subscriptions which it could not authorize the county itself to make. Precisely this argument has been advanced to uphold the position that in a state having a constitutional provision forbidding state aid to corporations, a county or township could not take stock in a railroad company. It has been uniformly rejected by the courts.

Township of Pine Grove v. Talcott, 19 Wall. 666.
Prettyman v. Tazewell, 19 Ills. 406.
Pattison v. Yuba County, 13 Cal. 175.
Dubuque v. Railroad Co., 4 Greene (Iowa), 1.
Clark v. Janesville, 10 Wis. 136.
Bushnell v. Beloit, Ib. 195.
New Orleans v. Graihle, 9 La Ann. 561.
Clark v. Rochester, 24 Barb. 446.
Cass v. Dillon, 2 Ohio St. 607.

Says Thurman, J., in the case last cited (at p. 616): "It was not supposed by the framers of the constitution that the mathematical axiom 'the greater includes the less,' would be an invariable canon of construction in considering their work."

Where the constitution of the state declared "no *county* shall subscribe for stock in any incorporated company unless the same be paid for at the time of such subscription; nor

shall any *county* loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company, nor shall the general assembly ever on behalf of the state assume the debts of any county, city or township, nor of any corporation whatever," it was held that a *city* was not prohibited from loaning its credit to a railroad corporation.

City of Aurora v. West, 9 Ind. 75.

The township is as distinct from the county as the county from the state, or the city from the county. They have distinct interests, and must be treated accordingly. Because the township is a part of the county it is no more to be confounded with the county than is the city, which may also be a part of the county. They are both as distinct from the county as they are from each other. There are numerous provisions of the constitution, a few only of which need be cited to show the necessity of confining the word county, wherever it occurs in that instrument, to its only known meaning.

ART. IV., Sec. 2, says: "Each county having one ratio (of population) or less shall be entitled to one representative" in the General Assembly. (Wag. stat. 45.)

ART. IV., Sec. 31 forbids the establishment of any new county with a territory of less than 500 square miles. (Ib. 48.)

ART. V., Sec. 22, requires that "there shall be elected by the qualified voters in each county * * * a sheriff and a coroner." (Ib. 52.)

ART. VI., Sec. 23, ordains the establishment of a county court in each county in the state.

State v. Macon Co. Ct., 41 Mo. 453.

Surely these provisions do not entitle each township in the state to one representative in the general assembly, nor require each township to maintain a court, a sheriff and a coroner, nor forbid the formation of new townships with a less area than 500 square miles. The defendant would hardly contend for such construction. But if the terms county and township are converitble in one section of the constitution, why not in another? When that instrument was framed, townships were political subdivisions as well known to the law of the state as counties. Nor was the convention oblivious of their existence. Art. 9, sec. 7, declares that "no *Township* or school district shall receive any portion of the public school fund, unless," etc. (Wag. stat. 59.) The omission to name townships has been attributed to the fact, that when the constitution was framed, such a township subscription had never been thought o then in existence authorized it, and none had made; it was an invention of a later period, when the railroad mania, spurning the narrow limits of previous legislation, sought a vent for its activity through enactments authorizing new modes of operation and new devices to secure public aid. If the truth of all this be conceded (and it can not be denied), it only fortifies the position that the convention did not intend to include township subscriptions. If they were then unthought of, they can not have been present to the minds of that body. The court will be governed in its construction by the apparent intention of the framers of the instrument in relation to the matter then under their consideration, to wit: subscriptions by counties, cities and towns; and if for any reason they have omitted to consider

shall any *county* loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company, nor shall the general assembly ever on behalf of the state assume the debts of any county, city or township, nor of any corporation whatever," it was held that a *city* was not prohibited from loaning its credit to a railroad corporation.

City of Aurora v. West, 9 Ind. 75.

The township is as distinct from the county as the county from the state, or the city from the county. They have distinct interests, and must be treated accordingly. Because the township is a part of the county it is no more to be confounded with the county than is the city, which may also be a part of the county. They are both as distinct from the county as they are from each other. There are numerous provisions of the constitution, a few only of which need be cited to show the necessity of confining the word county, wherever it occurs in that instrument, to its only known meaning.

ART. IV., Sec. 2, says: "Each county having one ratio (of population) or less shall be entitled to one representative" in the General Assembly. (Wag. stat. 45.)

ART. IV., Sec. 31 forbids the establishment of any new county with a territory of less than 500 square miles. (Ib. 48.)

ART. V., Sec. 22, requires that "there shall be elected by the qualified voters in each county * * * a sheriff and a coroner." (Ib. 52.)

ART. VI., Sec. 23, ordains the establishment of a county court in each county in the state.

State v. Macon Co. Ct., 41 Mo. 453.

Surely these provisions do not entitle each township in the state to one representative in the general assembly, nor require each township to maintain a court, a sheriff and a coroner, nor forbid the formation of new townships with a less area than 500 square miles. The defendant would hardly contend for such construction. But if the terms county and township are converitble in one section of the constitution, why not in another? When that instrument was framed, townships were political subdivisions as well known to the law of the state as counties. Nor was the convention oblivious of their existence. Art. 9, sec. 7, declares that "no *Township* or school district shall receive any portion of the public school fund, unless," etc. (Wag. stat. 59.) The omission to name townships has been attributed to the fact, that when the constitution was framed, such a thing as a township subscription had never been thought of; no law then in existence authorized it, and none had ever been made; it was an invention of a later period, when the railroad mania, spurning the narrow limits of previous legislation, sought a vent for its activity through enactments authorizing new modes of operation and new devices to secure public aid. If the truth of all this be conceded (and it can not be denied), it only fortifies the position that the convention did not intend to include township subscriptions. If they were then unthought of, they can not have been present to the minds of that body. The court will be governed in its construction by the apparent intention of the framers of the instrument in relation to the matter then under their consideration, to wit: subscriptions by counties, cities and towns; and if for any reason they have omitted to consider

and provide for subscriptions by townships, the court must so declare. Though it may believe that sound policy requires the application to townships of the restrictions imposed upon the other municipal bodies, it has no power to make that application. That fact could only prove the necessity for an alteration of the constitution, which we shall presently see has since taken place. "It does not belong to the courts to interpolate constitutional restrictions." (19 Wall. 677.) Except in this class of cases I doubt if it was ever suggested, that a law or constitutional provision professedly relating only to the state, was applicable to a county as such; or that one naming only the county operated upon a city or township as such. Industrious search would no doubt reveal many provisions of law upon the statute books of every state, the reason of which is applicable to counties, cities, towns and townships ~~alike~~; yet if the legislature has applied themto one and not to the other, the courts do not undertake to supply the defect.

The legislature has full control over the townships. Acting upon this view, that body appears to have framed the Township Aid Act without reference to the 14th section. That section requires the assent of "two-thirds of the qualified voters of the County, City or Town," and so does the law enacted to carry it out (Wag. Stat. 305, § 17.) The Township Aid Act only requires the assent of "two-thirds of the qualified voters of such township *voting at such election.*" The difference is so manifest as to strike the most casual reader. Under the latter act the requisite majority is determined by the number of qualified voters actually

participating in the election; under the former (sec. 17), by the number of names found upon the registry lists. The phrase "two-thirds of the qualified voters of the County" has been recently construed by the Supreme Court of Missouri. The state constitution required the assent of that majority to the removal of a county-seat. The same instrument provided for a system of registration of voters, making registration essential to the exercise of the elective franchise, and the registry lists the only evidence of qualification. Says the court: "Our constitution in regard to the proposed removal of county seats, it seems to me, hardly admits of two constructions. It prohibits the legislature from removing them, unless two-thirds of the qualified voters shall, at a general election, vote for the removal. The words do not imply an acquiescence or a negative sanction, or a negative assent inferred from absence, but a positive vote in the affirmative, and the number of voters required is specifically named; and there is no difficulty in ascertaining what that number is, since the same constitution provides for a registration, and points out who the qualified voters are." It was decided that as there were 694 registered voters in the county, of whom 547 voted at the election, 244 votes in favor of removal were not sufficient, although only 47 were cast against it.

State v. Sutterfield, 54 Mo. 391.

To the same effect are

Chester, etc., R. R. Co. v. The Commissioners, 72 N. C. 486.

Cocke v. Gooch, 5 Heiskell (Tenn.), 294.

State v. Woodford (Sup. Ct. Kansas, Dec. T, 1875), 2 Cent. Law Journal, 818.

Again the 14th section of the 11th article requires a two-thirds majority of the voters of the entire county. The Township Aid Act calls only for a vote of the township.

Here are two discrepancies which, if that section applies to townships, will certainly invalidate the act. The latter objection was raised and overruled in the case of The State v. Linn County Court, 44 Mo. 504, in which the validity of the act was expressly affirmed. It may be added that upon the faith of that decision, made within eighteen months after its passage, millions of bonds have been issued and are now afloat.

In striking contrast with the constitution of 1865 stands the comprehensive provision of the present constitution (adopted October 30th, 1875), the 47th section of the 4th article of which reads as follows: "The general assembly shall have no power to authorize any county, city, town or TOWNSHIP *or other political corporation or subdivision of the state now existing, or that may be hereafter established*, to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company." We insist, that in the absence from the constitution of 1865 of language like this, there is no ground to claim that the legislature had not the same power over townships as previous to that time it had had over counties, cities and towns. That power had been unlimited, and enabled it to authorize subscriptions to be made for these municipalities without a vote of the people.

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It will be seen by reference to the opinion of the learned Circuit Judge (Rec. p. 9) that he assumes, that the constitution controls the subject of township subscriptions, and bases his judgment on that assumption. If I have shown that to be erroneous, then all difficulty in the way of plaintiff's recovery is removed. The legislature having full control of the whole subject, the validity of both the township aid act and of the consolidation act must be conceded; and the proceedings in the present case having been taken substantially in pursuance of these laws, the subscription is good. The bonds are therefore legal and binding; the petition shows a good cause of action against the county as the representative of the township, and the nominal obligor in the bond, and the demurrer, should have been overruled.

T. K. SKINKER,

Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

G. W. HARSHMAN, Plaintiff and Appellant,

vs.

BATES COUNTY, Respondent.

No. 150.

STATEMENT OF THE CASE BY GLOVER & SHEPLEY, FOR THE RESPONDENT.

This case comes here upon a certificate of division of opinion, between the judges from the western district of Missouri, upon a judgment rendered in the Circuit Court against the plaintiff upon the sustaining of a general demurrer to the petition.

The plaintiff in said petition stated substantially as follows:

1st. That Bates county, on the 18th January, 1871, issued its bond of one thousand dollars, No. 90, by which it acknowledged itself indebted, on the 18th day of January, 1886, to the *Lexington, Lake and Gulf Railroad Company, for and on behalf of Mount Pleasant township*, in said county, with interest thereon, semi-annually, at 10 per cent. per annum, on presentation of coupons.

2d. That upon the petition of twenty-five tax-payers of said township to said court, setting forth their desire as a township to subscribe $90,000 to the capital stock of the "Lexington, *Chillicothe*, and Gulf Railroad Company," and

to issue bonds therefor, the county court ordered an election to be held in said townships, on the *3d day of May*, 1870, to determine if such subscription should be made; that said named company was a corporation of Missouri, and was then building and proposing to build its way into, through, or near said township; that said election was held, and two-thirds of the township voted in favor of said subscription.

3d. That after said vote so to subscribe to the stock of the Lexington, Chillicothe, and Gulf Railroad Company, and on the 18th July, 1870, a new company was formed, by the name of the Pleasant Hill Division of the Lexington, Chillicothe, and Gulf Railroad Company, and on the 4th of October, 1870, the said Lexington, *Chillicothe*, and Gulf Railroad Company, in whose favor the subscription was voted, became consolidated with said other company, organized since said vote, and known as the Pleasant Hill Division of the Lexington, Chillicothe, and Gulf Railroad, under the laws of the State of Missouri, which consolidated company took the name of Lexington, *Lake* and Gulf Railroad Company.

4th. After the consolidation, and without any further action of the township, the county court, acting under the authority alleged to have been conferred by such vote, subscribed $90,000, on behalf of said township, to the *consolidated* company of the Lexington, *Lake* and Gulf Railroad Company, and issued the bonds before mentioned in payment for such subscription.

5th. The petition then went on to show the routes of the two railroads, as fixed by their several charters prior to their consolidation. Both commenced at the city of Lexington, in Lafayette county, Missouri, and ran one southwardly and the other southwestwardly, so that the route of each road passed into Bates county, and near the town of Butler; and the route of the Lexington, *Chillicothe*, and Gulf Railroad voted on, and the route of the Lake and Gulf formed a flattened ellipse of about eighty-three miles in length, and averred that the routes of the two roads, at

the point of greatest divergence, were not more than fifteen miles apart, and both near or through Mount Pleasant township; and that the consolidated road was graded and bridged through the town of Butler, which was about in the center of Mount Pleasant township.

6. That Bates county had caused to be collected from Mount Pleasant township by taxation the sum of $5,000, and with it had paid forty-four of the coupons of interest due on January 18, 1872, on those bonds.

7. That he was the holder of a coupon of $100, being one year's interest on said bonds, and asks for judgment, filing the bond and coupon, and making the same a *part of the petition.* The petition contained thirty similar counts upon coupons on similar bonds, amounting in all to thirty-one hundred dollars.

The bonds, for interest on which, suit was brought contained the following recitals on their face:

1st. That it was issued pursuant to articles of *consolidation*, in payment of stock due the Lexington Lake, and Gulf Railroad Company, consolidated October 4, 1870.

2d. That Bates county, on the 18th of January, 1871, promises to pay the Lexington, Lake and Gulf Railroad, Company, on behalf of *Mount Pleasant township*, one thousand dollars, with interest, &c.

3d. That the said bond was issued by Bates county, by virtue of the act of March 23, 1868, and authorized by a vote taken by the people May 3, 1870, upon a proposition to subscribe $90,000 to the capital stock of the Lexington, CHILLICOTHE, and Gulf Railroad Company, which last-named company and the former Pleasant Hill Division of the Lexington, Chillicothe, and Gulf Railroad Company were, on October 4, 1870, consolidated, *as required by law*, into one company, under the name of the Lexington, LAKE and Gulf Railroad Company.

4th. That said last-named company, as provided by law and by the articles of consolidation, possessed all the powers, rights, and privileges, and owns and controls all the assets,

subscriptions, bonds, moneys, and properties whatever of the two companies.

The defendant demurred, on the ground that the bonds were illegally issued; the petition on its face showing that Bates county had no right in law to make a subscription for stock in behalf of Mount Pleasant township to the capital stock of the consolidated railroad; the question of such subscription never having been submitted to the people of Mount Pleasant township; and that it therein appears that the subscription, bonds, and coupons were without warrant of law.

At the time this subscription was voted and made, and when the bonds were issued, the following constitutional provision and laws were in force in Missouri:

1. CONSTITUTION MO., ART. 11, SEC. 14.

"The general assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless *two-thirds of the qualified voters of such county*, city, or town, at a regular or special election to be held therein, shall assent thereto." (Wagner's Statutes, Ed. 1872, p. 62.)

2. THE TOWNSHIP AID ACT.

"Whenever twenty-five persons, tax-payers and residents in any municipal township for election purposes in any county in this State, shall petition the county court of such county, setting forth their desire as a township to subscribe to the capital stock of any railroad company in this State, building or proposing to build a railroad into, through, or near such township, and stating the amount of such subscription, and the terms and conditions on which they desire it made, it shall be the duty of the county court, as soon as may be thereafter, to order an election to be held in such township to determine if such subscription shall be made; which election shall be conducted, etc., etc.; and if it shall appear from the returns of such election that not less than two-thirds of the qualified voters of such township, *voting at such election*, are in favor of such subscription, *it shall be the duty of the county court to*

make such subscription in behalf of such township, according to the terms and conditions thereof, and if such conditions provide for the issue of bonds in payment of such subscription, the county court shall issue such bonds in the name of the county, with coupons, etc. (Wagner's Stat., p. 313, sec. 51; Laws of Mo., 1868, p. 92.)

3. The Railroad Consolidation Act.

"Any two or more railroad companies in this State existing under either general or special laws, and owning railroads constructed wholly or in part, which when completed and connected will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges, and immunities, and subject to all the obligations and liabilities to the State or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract, fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders regularly called for the purpose, or by the approval in writing of the persons or parties holding and representing a majority of such stock: * * * * *Provided, however*, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except when, by such consolidation, *a continuous line of road is secured running in the whole or in the main in the same general direction*, and provided that it shall not be lawful for said roads to consolidate in the whole or in part, when by so doing *it will deprive the public of the benefit of competition* between said roads, *and in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this act such consolidation shall be void*, and any person or party aggrieved, whether stockholders or not, may bring action against them in the Circuit Court of any county through which such road may pass, which court shall have jurisdiction in the case, and power to restrain by injunction or otherwise, etc. (Act of March 24, 1870; Wagner's Stat., 314, sec. 56; Laws of Mo., 1870, p. 98.)

Under the Township Aid Act the county court was authorized to issue bonds on behalf of any township in its county to pay for stock subscribed to a railroad company, provided the subscription was first sanctioned by a vote of the people of the township. The bonds were issued in the name of the county, purporting on their face to be the promise of the county. They were issued in this form, because at that time townships in Missouri had not been endowed with corporate capacity, and had no separate governing body to administer their affairs. They were simply so much of the territory of the county as was included within congressional township lines. The bonds, however, constituted no obligation of the county; the holder's only claim is against the township, which alone is liable to be taxed to pay them. This was the effect assigned them, very soon after the passage of the act, in State *v.* Linn County Court, 44 Mo., 504. Accordingly it has been the practice in suits upon such bonds to enter judgment against the county, with a clause limiting its enforcement to the township.

The questions then presented are whether the county court of Bates county had any power to make the subscription to the alleged consolidated road of the Lexington, Lake and Gulf railroad, and whether the collection of certain taxes by the county from the township, and the partial payment of one year's interest, estopped the township and the county from disputing the validity of the bonds.

Brief by Glover & Shepley for Respondents.

I. There is no question arising here in reference to the plaintiff being a *bona fide* purchaser taking the bonds without notice, as by the recitals in the bonds he was affected with notice of every material fact affecting the validity of the bonds.

On the face of the bonds it is recited—

1. That the bonds are issued by Bates county for and in behalf of Mount Pleasant township.

2. That they were issued under and pursuant to an order

of the county court of Bates county, in virtue of the act of the General Assembly approved March 23, 1868, entitled "An act to facilitate the construction of railroads in the State of Missouri.

3. That they were issued in payment of stock, not to the company to which authority was given to subscribe by vote, but to the Lexington, Lake and Gulf Railroad, consolidated October 4, 1870.

4. That the order of the county court of Bates county, under which the bonds were issued, was authorized by a vote of the people of Mount Pleasant township taken May 3, 1870, upon a proposition to subscribe $90,000 to the capital stock of the *Lexington, Chillicothe and Gulf Railroad Company.*

5. That the said road (as to the subscription to whose stock the said vote was taken on the 3d day of May, 1870) was, on the 4th day of October, 1870, consolidated with the former Pleasant Hill Division of the Lexington, Chillicothe and Gulf Railroad Company, into one company, under the name of the *Lexington, Lake and Gulf Railroad Company.*

So that the purchaser of the bond could not, however much he might desire to, shut his eyes; but took it with a full knowledge of how, for what, under what circumstances and under what laws it was claimed to have been issued.

II. It is shown by the averments of the petition that the alleged consolidated road, called the Lexington, Lake and Gulf Railroad Company, to which the subscription is averred to have been made, had no valid and legal existence, having been pretended to be made, in flagrant violation of the only law of the State allowing any amalgamation or consolidation of a railroad to be made.

The only act allowing such consolidation is the act part of which we have before set out. (1 Wagner Statutes, p. 314, § 56; Session Acts of 1870, p. 89.) The Legislature designed to prevent the very thing here attempted, to wit, to prevent the consolidation of substantially parallel roads, by requiring that the roads to be consolidated should form

one continuous line. But what the Legislature did not intend should be done was the amalgamation of two lines of road commencing at the same point and running in the same direction at the most distant point only fifteen miles apart, and ending at substantially, or it may be said identically, at the same point. Therefore a proviso was inserted in the act, that it should not be construed to allow any consolidation, unless by such consolidation a *continuous* line of road was secured thereby, *running in the same general direction;* and further, that no roads shall be allowed to consolidate which would deprive the public of competition between the roads; that is, that part of a line of road forming one continuous road, but which had been before managed by two or more corporations, might amalgamate; and, also, if there were two lines of railroad actually built, (as, for instance, if the Lexington, Chillicothe and Gulf Railroad Company and the Pleasant Hill Division of that road, being two corporations, had constructed their lines of road from the same point,) that they should not be allowed to consolidate; and provided in these cases if any attempt was made, such attempted consolidation should be utterly null and void. Therefore, when the purchaser took them, he knew that these bonds were dependent for their validity upon the legality of certain acts done under color of certain laws of the State, to all of which he was pointed. He knew that they were issued in behalf of Mount Pleasant township, for which Bates county in this matter was acting only as trustee; and he was called upon to examine and determine for himself whether these different acts upon which the validity of the bonds depended rested upon any laws, and if so, whether the laws had been complied with.

III. But even if this were a legal corporation, this bond, thus on its face stated to have been issued by Bates county in behalf of Mount Pleasant township, in consideration of stock in the consolidated road, must, to have been valid, have been issued in satisfaction of a stock subscription au-

thorized by two thirds of the qualified voters of the town, and there was no vote authorizing such subscription.

The assent of two thirds of the qualified voters of the township making the subscription is an indispensable prerequisite to the validity of the making of the subscription and the bonds to be issued for its payment, as between the railroad company and any one whatsoever, as we say, but certainly as to any one taking from it the bonds with notice, on the one part, and the township and county on the other; for—

1st. The constitution of the State prescribed it.

This proposition is denied by the appellant, and a very elaborate argument is made to show that no such constitutional prohibition exists. This is maintained on the ground that the constitution names "counties, cities, and towns," but not *townships*.

To this suggestion there are two answers. The first is, that the framers of the constitution intended and supposed it had included every possible corporation or political subdivision when "it provided that the General Assembly should not authorize any county, city, or town to loan its credit to any corporation, &c., unless two thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." The State itself had, by another provision, been absolutely prohibited; and by this provision the convention thought that no other subscription could possibly be made of persons in their collective political capacity, unless authorized by a vote of two thirds of the *qualified voters* of the corporation or political subdivision that was to make the subscription.

But the persons who were intent upon the getting of bonds under the guise of making a railroad were too sharp for that, so they thought of the happy device of getting an enabling act, so as to let the persons upon a certain portion of the surface of the county vote, and if they could not get the vote out of the town, they could out of the township in which the town was.

If this can be done, this curious result follows, that though there could be no subscription of the county without the assent of two thirds of the qualified voters of the county, there is no prohibition in the constitution against the Legislature authorizing the persons who were not a municipal or quasi municipal corporation, or even a political subdivision, but only a certain extent or portion of the county, to do that which the entire body of voters in the county could not do. But—

2d. We say that as the township, in and of itself, cannot become a stockholder in or loan its credit to any corporation, but the county has to act in its behalf, this provision literally applies to this subscription, attempted to be authorized by this township act of March 23, 1868, and it is no answer to say that it is done as trustee for and in behalf of the township.

Therefore we maintain, either that this township action is controlled by the provision of the constitution, or that this provision prohibits the Legislature from passing such an act as this of the 23d day of March, 1868.

If it be controlled by this constitutional provision, then no subscription can be made under the constitution, except to the railroad company, to which the township has voted to make a subscription to, and no consolidation act or act giving authority to counties or township can by its terms give any authority to make subscription to any stock, except to the stock of the identical railroad company in favor of subscribing to which the qualified voters had given their assent.

3d. The legislative act of the 23d March, 1868, equally required the assent of two-thirds of the qualified voters of the township in favor of the subscription to the particular railroad before the county were authorized to make it for the township.

IV. If the subscription had been made to the Lexington, CHILLICOTHE, and Gulf Railroad Company, as authorized by the vote of the township, yet that would have

imposed no obligation upon the township or the county to pay that subscription to or become a stockholder in the consolidated road.

Clearwater *v.* Meredith, 1 Wall., 40.

Opinion of Judge Dillon in the present case.

This is established, we submit, by the able reasoning by the court below; but whether it be true or not does not affect the question here, because neither was the subscription required nor made to the company in whose favor the vote was given, but was made after the consolidation was effected, (if it was ever legally effected,) and to the new company.

V. The vote gave no authority to the county court of Bates county to make the subscription to the alleged consolidated road of the Lexington LAKE, and Gulf Railroad Company.

It is strongly urged by the appellants that, upon the vote in favor of making the subscription, it became the *duty* of the county court under the law to make the subscription, and that they had no discretion in the matter. It is not necessary to deny this, but certainly not until they are requested to do so by the railroad company. There is nothing here showing any such application by the Lexington, *Chillicothe*, and Gulf Railroad Company, in whose favor the vote was given, to have such subscription made; but we insist that the admitted facts sufficiently indicate that it never was the intention that the *subscription* should be made to that railroad company. The act permitting townships to subscribe was approved March 23, 1868. The petition had been presented to the county court and an election ordered, which took place on the 3d May, 1870, which resulted in a vote to subscribe stock to the Lexington, *Chillicothe*, and Gulf Railroad Company.

It is not stated in the petition when the corporation of the Pleasant Hill Division of the Lexington, *Chillicothe*, and Gulf Railroad Company was organized, nor what was its route; but it is fair to assume that it was organized

after the vote, and that the line adopted by the consolidated road was the line of the Pleasant Hill Division, otherwise the vote was for one road, while another road in substantially the same direction was existing; and that the consolidated road adopted a different route from either of the companies, forming the consolidation against the letter of the consolidation law. But on the 4th of October, 1870, the alleged consolidation was made, adopting as their route a line having the same northern terminus and running in the same general direction not further apart than fourteen miles distant for eighty-three miles, to or near the town of Butler, in Bates county, with a view of sweeping in all the bonds to be had upon that line—the object obviously being to get bonds, not to build railroads.

And now we see very clearly why the railroad company did not invite the county to subscribe to the stock of the railroad company voted for. If the county had subscribed to the original company, then their large amount of stock of $90,000 could have voted upon this question of consolidation, and that was exactly what was not wanted. What the result would have been if they had been permitted to subscribe and had voted, we cannot say; but they were not allowed to do so, and it is to be presumed that, as the township voted to give aid to one line of road, that they would not have voted to consolidate with another line in the same general direction. The township voted to subscribe to the stock of a road over which, by its subscription to the stock, it would have had (through the county) some control. But no subscription to this original railroad company was asked for—none intended to be asked for—none made. When the alleged consolidation, on the 4th of October, 1870, was attempted to be effected, Mount Pleasant township or Bates county had no interest in the Lexington, Chillicothe, and Gulf Railroad Company. All that had been done was an expression of an *intention* on the part of Mount Pleasant township to aid the road by subscription.

Without any subscription having been made, these two

paper corporations attempt a consolidation in flagrant disregard and in the teeth of the provisions of the very law giving the only authority, and this in two particulars.

The routes of the roads did not form one continuous line, and the lines of the two companies were competing lines. The attempt to make such a consolidation subject as it was to both of these objections, the act says, makes the whole utterly void. (See the terms of the act printed in the statement.)

But the attempt was made under the general railroad law and the law for the consolidation of railroads, and a new railroad company was, so far as the action of these two companies could do it, created on the 4th of October, 1870.

In January, 1871, the county court made the subscription to the consolidated road of the Lexington, Lake and Gulf Railroad Company. This the county could not do, for two reasons: First, because the consolidation attempted was void, and so pronounced in the law itself; and, secondly, because they had no authority from the township for making any such subscription. The township had authorized the county to subscribe to the stock of a railroad company whose route they knew and approved; whose resources and future it may be presumed they had investigated, and over whose future, by its subscription, it would obtain a powerful influence. The township had not been asked to subscribe to the stock of the other company, and had given to the county court no authority to do so.

But the county court, perhaps under the influence of these railroad managers, perhaps honestly thinking that the court was compelled to make the subscription, proceeded to make the subscription to this attempted consolidated company, and to issue its bonds for, and on behalf of, the Mount Pleasant township, to the amount of $90,000, and deliver them to the company.

It would seem upon principle that this subscription, so made, was entirely illegal and void.

existed in the case of Marsh *v.* Fulton county, are in that case re-examined and held to be fatal to the validity of the bonds.

We insist that, instead of supporting the views of the appellant, the case of Nugent *v.* The Supervisors gives strong support to the decision of the court below.

VI. The action of the county court in levying and collecting a tax from the township for the purpose of paying the interest upon the bonds, and the application of it to the part payment of one year's interest, cannot validate the bonds if they are illegal, nor estop the county for contesting their legality, more especially as the purchasers of the bonds are affected with notice of all the facts on which their validity depends by the recital on the face of the bonds.

If we are correct in the conclusions reached in the previous point, it will not be necessary to say much upon this.

In the case of Marsh *v.* Fulton county, this court held that the bonds in the hands of an innocent purchaser without notice, were void, and this when the county had been paying the interest on the bonds for years. In this case there can be no such innocent holder, as by the recital on the face of his bond, he is affected with the knowledge of every fact effecting its validity.

In the case of Nugent *v.* The Supervisors, the court held, that by paying the interest on the bonds the county is estopped to deny the validity solely as stated in the opinion, upon the ground that *the subscription as made was valid and binding.*

As we believe that we have shown that the objections to these bonds are much stronger in this case than in Marsh *v.* Fulton county, we shall not elaborate this point further.

GLOVER & SHEPLEY,
For Defendant in Error.

SUPREME COURT, UNITED STATES.

CASE NO. 150.

G. W. Harshman, — *Plaintiff in Error.*

vs.

Bates County. — *Defendant in Error.*

Error to the Circuit Court of the United States for the Western District of Missouri.

BRIEF FOR DEFENDANT IN ERROR.

The defense in this case is based upon the following leading facts and considerations:

1st. There was no vote in favor of the company to which the bonds were issued—hence no power in the County Court of Bates County to issue them.

The law of Missouri, touching the authority of County Courts to subscribe for stock in Railroad companies, and to issue bonds therefor, and upon which the bonds in suit are based, is as follows:

The Constitution of Missouri, Section XIV, Article 11, prescribes:

> The General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city, or town at a regular or special election to be held therein, shall assent thereto.

Section LI, Article 2, Chapter 37, Wagner's Statutes of Missouri, is as follows:

Whenever twenty-five persons, tax-payers and residents in any municipal township, for election purposes, in any county in this State, shall petition the county court of such county, setting forth their desire, as a township, to subscribe to the capital stock of any railroad company in this State, building or proposing to build a railroad into, through or near such township, and stating the amount of such subscription, and the terms and conditions on which they desire such subscription shall be made, it shall be the duty of the county court, as soon as may be thereafter, to order an election to be held in such township to determine if such subscription shall be made; which election shall be conducted and returns made in accordance with the law controlling general and special elections, and if it shall appear, from the returns of such election, that not less than two-thirds of the qualified voters of such township voting at such election are in favor of such subscription, it shall be the duty of the county court to make such subscription in behalf of such township, according to the terms and conditions thereof, and if such conditions provide for the issue of bonds in payment of such subscription, the county court shall issue such bonds in the name of the county, with coupons for interest attached; but the rate of interest shall not exceed ten per cent. per annum; and the same shall be delivered to the railroad company.

Section LVI, same Article and Chapter, is as follows:

Any two or more railroad companies in this state existing under either general or special laws, and owning railroads, constructed wholly or in part, which when completed and connected will form in the whole or in the main, one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company, owning and controlling such continuous line of road with all the powers, rights, privileges, and immunities, and subject to all the obligations and liabilities to the State, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company, or road proposing to consolidate, at a meeting of the stockholders, regularly called for the purpose, or by the approval in writing of the persons, or parties, holding and representing a majority of such stocks. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the Secretary of State, when the consolidation shall be considered duly consumated, and a certified copy from the office of Secretary of State shall be deemed conclusive evidence thereof. The board of directors of the several companies, may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding, in the several companies, or roads, and issuing certificates of stock, in the new consolidated company, under such corporate name as may have been adopted, provided, however that the foregoing provisions of this section, shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation, a continuous line of road is secured, running in the whole, or in the main, in the same general direction, and, provided, it shall not be lawful for said roads to consolidate in the whole or in part, when by so doing it will deprive the public of the

benefit of competition between said roads, and in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the circuit court of any county through which said road may pass, which court shall have jurisdiction in the case, and power to restrain by injunction, or otherwise, and in case any railroad in this State shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars, without breaking bulk, upon said consolidated road, and such consolidated road, shall transact the business of said intersecting or connecting road or roads, on fair and reasonable terms, and the same may be enforced by appropriate legislation. Before any railroad company, shall consolidate their roads, under the provisions of this act, they shall each file with the Secretary of State a resolution accepting the provisions thereof, to be signed by their respective presidents, and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders thereof, to be called for the purpose of considering the same.

Before the 5th day of April 1870, over twenty-five taxpayers and residents of Mount Pleasant township, petitioned the County Court of Bates county, setting forth their desire to subscribe $90,000 to the capital stock of the Lexington, Chilicothe & Gulf Railroad Company; and thereupon the said Court ordered that an election should be held in the said township, on the 3d day of May 1870, to determine if such subscription should be made.

The subscription was carried in compliance with the law.

After the vote was held, on the 18th day of July 1870, the Pleasant Hill division of the Lexington, Chilicothe & Gulf Railroad company was organized; it being a new, distinct and separate company from the one to which the voters of the Township had signified their desire to subscribe to; and on the 4th day of October 1870, before the County Court had subscribed the $90,000 of stock to the road to which it was voted, the two companies were consolidated in pursuance with the act of consolidation hereinbefore cited, under the name of the Lexington, Lake & Gulf Railroad Company.

This consolidation was effected with $90,000 of the stock which had been voted to one of the said companies, not in any manner represented, and with no voice as to the said consolidation, or the terms thereof.

The terms of the subscription suggested by the vote of the Township, required that the road to which stock was voted was to come by the way of Holden, in Johnson county,

whereas, the road to which the County Court made the subscription upon which these bonds are based, as late as the 18th day of January 1871, came by the way of Pleasant Hill, in Cass county, full fifteen miles west of the said city of Holden, and in fact adopted the ENTIRE LINE of the said PLEASANT HILL DIVISION OF THE LEXINGTON, CHILICOTHE & GULF RAILROAD COMPANY.

The enquiry is submitted in the light of the decision of this court in the case of Marsh vs. Fulton county. 10 Wall. 672. Where did the County Court of Bates County derive their power and authority to subscribe stock for this Township to the capital stock of the Lexington, Lake & Gulf Railroad company, a road which had not been organized, and was not in existence when the vote was taken to ascertain the purpose and desire of the tax-payers and residents of said township ?

It may be said in answer to this, and it seems to be so asserted in the bonds, that this power and authority was by virtue of the action of the two companies under the consolidation act. Then why was not this $90,000 of stock permitted to speak with reference to this consolidation ?

The result might have been far different, and everything indicates that it would. It is claimed by the defense that all efforts at consolidation by the companies were entirely worthless so far as to bind Mount Pleasant Township as long as no subscription was made to the capital stock of the Company to which it had indicated a desire to subscribe, more especially as it had no voice in the effort made for consolidation.

2d. The plaintiff in his petition has said "that the said consolidated road is now located, graded and bridged from said city of Lexington, along the route of the said consolidated road as above described, to said town of Butler, and for several miles southward of said town."

We do not conceive that this statement will change the law of this case in any manner. But if any answer thereto was necessary, we say that the terms of the subscription, as indicated by their petition, proposed to be made by the tax-payers and residents of Mount Pleasant township, was that the said Lexington, Chilicothe & Gulf Railroad, company should come from Lexington, by the way of the city of

Holden to the town of Butler, in said township, and that the road should be COMPLETED, and the CARS RUNNING THEREON to the town of Butler, on or before the 4th day of July 1871, or the said subscription and the bonds issued thereon were to be void.

Now as a matter of fact, the said consolidated road is not to this day completed; not a rail of iron is laid thereon, nor are the cars running to the town of Butler, on any part of said road south of the City of Lexington, and it is also a fact that no work has been done on this road for over two years. This we say, however, in our opinion does not change the law as to these bond-holders, but only stands as a set-off against any effect or influence any such statement might have in the adjudication of this case as it is now presented to this Court.

3d. It is contended that the defense in this case is a better and stronger one than that presented to this Court in the case of Marsh vs. Fulton County.

Because we say that the road to which the County Court of Bates County assumed the power to subscribe to, was more distinctly a different road from the one to which the Township of Mount Pleasant voted, than in the case cited; and these bonds are in no sense county bonds.

Bates County, FOR AND IN BEHALF OF MOUNT PLEASANT TOWNSHIP THEREIN, issues these bonds.

Whatever may be the judgment here, if for the Plaintiff, the tax-payers of Mount Pleasant township must pay it, and not Bates county.

The County court of Bates county was merely selected by the Legislature as the medium through which the tax-payers and residents of the Township could act, and the mere ministerial agent to carry out and perform the directions, desires and purposes of the Township, as manifested and expressed in the petition which the law required them to file before a vote could be ordered.

The doctrine held in a number of cases where suit has been brought on COUNTY BONDS, issued by County courts, can not apply here. The proposition that the county is the principal, the Court, the Agent, does not apply here.

The County court here had no general power whatever, over this township. It could not act at all until

the number of tax-payers and residents required by law had indicated by petition what they desired done, and if a two-thirds vote manifested that they desired a subscription made, then it became the duty of the County court to make such subscription in behalf of such township, ACCORDING TO THE TERMS and conditions suggested by the voters of the township and to the road named by them. Thus far the County court was authorized to go, and no further, and any other or further action by it was *ultra vires*. It had neither express or implied authority to make subscription or issue bonds to any other road or in any other manner than manifested, suggested and directed by the vote of the Township in accordance with the petition filed, as required by law. But here, in disregard of the direct suggestions of the tax-payers and residents of the Township, without giving them an opportunity to express any opinion as to the consolidation effected, and long after this was done, the County court says that this township shall subscribe $90,000 to the capital stock of an entirely different road from the one they desired to take stock in; certainly the law never intended or contemplated such an immense stretch of authority as this.

4th. If the County court did not possess power and authority derived from the vote of the township under the legislative enactment hereinbefore quoted to issue these bonds, then they are void—their collection cannot be enforced against the tax-payers of the township. Floyd acceptances, 7 Wall. 666. Marsh vs. Fulton county, 10 Wall, 676.

The negotiability of these bonds can have no effect upon this question, as this enquiry turns upon their legal existence.

The act of March 24th, 1870, authorizing the consolidation of Railroad companies did not give the County court the power, or authorize it to subscribe stock or issue bonds to the Lexington, Lake & Gulf Railroad company.

It is claimed that the Plaintiff purchased *bona fide*.

He does not stand in the position of an innocent holder for value. The bond on its face shows that it is worthless and invalid—that it was issued without authority—that the County court had no power. Justice Field, in Marsh vs. Fulton county, says: "Purchasers of these bonds are bound

to look to the action of the officers of the courts and ascertain whether the law has been so far followed as to justify the issue of the bonds." If this doctrine be true, it applies with peculiar force to the bonds now under consideration.

5th. Again, it may be claimed and we suppose is claimed, that the people have ratified the issue of these bonds by their acquiesence and silence, and from the mere fact of some of the tax-payers having paid a portion of the first installment of interest.

The silence and assent of all the people in the township could not confer the power to issue these bonds. How could it ratify them after they were issued? The power to issue comes only from legislative enactments. The law must be complied with and the bonds issued as directed by the vote of two-thirds of the voters of the township. If they were issued without authority the acts of the Court issuing them cannot be ratified by the implied assent of the people nor expressly either. Marsh vs. Fulton county.

The case most strongly relied upon by the Plaintiff in error, is that of Nugent vs. Putnam county, 19 Wall. The distinctive differences between that case and the case at bar are as follows :

The bonds in that case were County bonds. In this case they are Township bonds.

In that case the subscription was made to the road to which it was voted prior to the consolidation, and the bonds were issued to the road to which the subscription was made and the County stock was represented in the meeting for consolidation.

In this case no subscription was made to the road to which It was voted. The subscription was made to the consolidated road and the township stock was not represented in the meeting for consolidation. Subscription was made after the consolidation, to another and different road and the bonds were issued to said road.

In conclusion we say that if these bonds are legal, then the vote of the people indicating to what road they desired to issue these bonds and the route designated by them amounts to nothing; is a mere nullity, and the County Court can change and alter at their pleasure the terms and conditions of the subscription voted.

No subscription was ever made to the Company to which the

Bonds were voted. The people of Mt. Pleasant township had no voice in determining with reference to the alleged consolidation of the two roads. The subscription must have been made by the County Court to the Lexington, Chilicothe & Gulf Railroad Company, and the voice of the Township to the amount of the said subscription must have been heard in the meeting or election consolidating the two roads.

The defendant can by no system of reasoning be held liable for the payment of these bonds.

JOHN W. ROSS, and
C. C. BASSETT,
Of Counsel for the defendant in error.